Supreme Court, U.S.
AUG 04 1993

In The

Supreme Court of the United States

October Term, 1992

No. 92-2042

CAROL ROBINSON,

Petitioner,

v.

CENTRAL BRASS MANUFACTURING, INTERNATIONAL UNION OF AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS, and UAW LOCAL 1196,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY IN SUPPORT OF CERTIORARI

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1. Respondents Central Brass and UAW Local 1196 both deny that there is any disagreement among the courts of appeals (neither denies the existence of conflicting district court decisions) about the question whether an unnecessary but good-faith exhaustion of intra-union remedies tolls the limitations period for pursuing the employer defendant in a hybrid suit for

breach of a collective bargaining agreement ("CBA") and of the duty of fair representation ("DFR"). However, there are several crucial errors in their discussions of the appellate decisions that were cited in the petition to show a conflict among the circuits.[1]

Both respondents deny that there is any conflict between the decision below and *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). In this regard, they disagree with the Sixth Circuit itself, which expressly **rejected**, "on two crucial points," the Seventh Circuit's adoption of a bright-line rule in *Frandsen*. Pet. App. 13a.

Respondent Central Brass argues that *Frandsen* limits automatic tolling to cases where a hybrid plaintiff argues that the employer and union conspired together; the union respondent argues that *Frandsen* was not a hybrid case at all, but rather a case involving negotiation of a discriminatory agreement. Although those are indeed the facts of *Frandsen*, the Seventh Circuit has read *Frandsen* broadly to give exhaustion a tolling effect in all suits against employers, in contract administration cases where the union is charged with dropping a grievance against the employer, as well as on the narrower facts of *Frandsen*. *Pantoja v. Holland Motor Express*, 965 F.2d 323, 327-328 (7th Cir. 1992); *Sosbe v. Delco Electronics*, 830 F.2d 83, 87 (7th Cir. 1987); *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1327 (7th Cir. 1986). *Accord*, *Garner v. UAW*, 800 F. Supp. 706, 712 (S.D. Ind. 1991). The Seventh Circuit prides itself on the simplicity of the "mechanical" *Frandsen* rule, precisely because it gives potential hybrid plaintiffs clear notice of the time to sue, regardless of factual variations, *Bonds*, *supra*, 806 F.2d at 1327, and always encourages members to exhaust before suing. *Sosbe*, *supra*, 830 F.2d at 87.

Indeed, the negotiation context in which *Frandsen* arose shows how firm the Seventh Circuit rule is, because it is far

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[1] The district court's opinions in this case have now been reported at 818 F. Supp. 207 and 212.

less likely that exhaustion of intra-union remedies can provide complete relief in a contract negotiation case than in a contract enforcement case. In a negotiation case, after all, even if the union decides that it erred, it must still persuade the employer to reopen the grievance, and no CBA of which we are aware provides for reopening the CBA based on intra-union appeals. In an enforcement case, by contrast, it is far more likely that there may be a provision for reinstating the grievance based on the sort of agreement that won recognition in *Clayton v. UAW*, 451 U.S. 679 (1981). The Seventh Circuit's holding in favor of tolling in negotiation cases, far from showing the **lack** of conflict between these two circuits, shows how much its approach differs from the rule adopted by the Sixth Circuit here.

Both respondents also deny that the decision below conflicts in any way with the Third Circuit's holding in *Scott v. Teamsters Local 863*, 725 F.2d 226 (1984). The UAW contends that the case contains "no discussion of [the] limitations issue with respect to [the] employer," Opp. 6, but in fact both the union and the employer in that case obtained dismissal on limitations grounds. *Id.* at 227. Moreover, the court of appeals reversed and remanded with respect to both defendants, treating them identically for limitations purposes, the opposite of what the Sixth Circuit did in this case.

Central Brass, for its part, argues that *Scott*'s tolling rule provides that exhaustion would sometimes have a tolling effect, and sometimes not, and so is similar to the decision below. Opp. 13-14, *citing* 725 F.2d at 229 n.2. In fact, although the cited footnote did withhold judgment on "the precise criteria" for determining tolling, the Third Circuit remanded for findings which, it said, would be dispositive: "Only if the April 7 letter . . . is taken as the termination of the internal appeal procedure . . . can this suit survive . . . under *DelCostello*." *Id.* at 229. Thus, the Third Circuit ruled that the timeliness of the suit against both defendants would depend in part on when the intra-union appeals procedure ended, and that decision is squarely contrary to the Sixth Circuit's holding that

tolling of Robinson's claim of CBA breach depends on whether the grievance could have been reinstated.[2]

2. The UAW argues that the question presented arises infrequently because "most" CBA's negotiated by the UAW provide for reinstatement of grievances, and thus are capable of providing complete relief. Opp. 4. However, such provisions are less common in CBA's negotiated by other unions, and in any event the ability to reinstate the grievance is only one factor that is considered in making the highly discretionary decision of whether to require exhaustion. Thus, the Catch-22 problem that is avoided by the *Frandsen* approach will arise frequently unless this Court grants certiorari and adopts *Frandsen*'s clear rule, under which the exhaustion of intra-union appeals always tolls the statute of limitations, regardless of whether, with the benefit of hindsight, the exhaustion is held to have been legally necessary based on *Clayton*'s multi-factor test.

3. Respondent Local 1196 also argues that review should be denied because of the possibility that, if petitioner prevails on her claim against the Local, she may be able to have her grievance against respondent Central Brass reinstated. This possibility -- which, we note, Central Brass does not embrace -- does not prevent the question on which review is sought from being squarely presented, because the relief petitioner seeks is not just reinstatement of her grievance, but reinstatement to employment and compensatory damages, neither of which is assured by the mere possibility of having the grievance reinstated. Moreover, even if Central Brass were bound by a determination of improper withdrawal, when made in litigation to which it is no longer a party petitioner must be able to prove a breach of both the CBA and the DFR just to be able to prevail

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[2] *Scott* does not discuss whether the CBA in that case provided for reinstatement of the grievance. In our experience, however, Teamster CBA's generally do not contain such provisions, and indeed the intra-union appeals procedure in the Teamster Constitution bars collective bargaining issues. Article XIX, Section 13(c).

against the union defendant. *See DelCostello v. Teamsters*, 462 U.S. 151 (1983). But Central Brass will surely not be bound by the finding with respect to the CBA, and so the question of whether the CBA was breached will have to be litigated a second time. Indeed, the prospect of two separate proceedings over the same factual disputes, one against the employer and one against the union, was one of the very strong reasons that impelled this Court to apply the same exhaustion and limitations rules to unions and employers alike in *Clayton* and *DelCostello*. Moreover, petitioner should not be required to go to trial on these claims simply in order to gain the right to have the UAW represent her in arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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